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THE NATURE AND EXTENT OF AN AGENT'S AUTHORITY*

§ 1. PURPOSE OF THIS PAPER.—It has been seen in another place how the relation of principal and agent may be created and how it may be terminated. The purpose of creating the agency is to confer authority upon the agent,—to clothe him to a greater or less extent, and for a shorter or longer period, with a portion of that power with which nature and the laws of society have invested the principal. For the time being, and in some capacity, the principal has another self, who, by his will and act, is invested with the power to speak and do with like effect as if he himself should speak or do.

It will be very evident that to those persons who may have occasion to deal with the principal through this other self, the question of how fully, how certainly and for how long a time, he has invested the latter with his own personality, becomes exceedingly important. And not only this, but these matters being ascertained, it is no less important to determine whether any given act assumed to be done by virtue thereof, is, in reality, within the fullness, the certainty and the term of the investment.

It will be equally evident that these are questions not always easy of solution, not only because men are notoriously careless and indefinite in their words and acts, but because even if, in a given case, a power has been conferred in terms the most express and definite, the questions may still arise whether the express words embrace the act assumed to be done by virtue of them; whether the mode of doing has been that contemplated by the language used; whether subsequent changes in the circumstances of the parties, or the condition of the subject matter have warranted any departure from that mode; whether in consideration of the nature of the act to be done, or the time and place of doing it, custom or necessity have added to, or subtracted from, the powers originally conferred.

It is the purpose of this paper to ascertain the principles upon which the solution of these questions rests.

§ 2. SCOPE OF THE QUESTIONS INVOLVED.—It will be evident, also, upon reflection, that these questions can not well be considered in the abstract. It may indeed seem at first thought that the authority of an agent will always be a fixed and definite quantity, and that there must be certain rules which may invariably be applied to determine its existence and to measure its scope and extent. Further

* [This article has been adapted from the forthcoming second edition of the writer's treatise on the Law of Agency. Editor Mich. Law Review.]

consideration, however, will show this to be an error. Authority, at least in the practical sense in which it is here dealt with, is an exceedingly concrete matter, it has very little abstract value, it is a variable quantity, it is affected by relations, it may present one aspect to one person and a different one to another person, it can not be separated from its environment. It will be evident, therefore, that we must consider not only its relation to persons, but the relation of persons to it. We must consider their duty to ascertain its existence, to interpret it properly, and to apply it correctly to the affairs in question.

§ 3. DISTINCTIONS BASED UPON NATURE AND EXTENT OF AUTHORITY.—In doing this, aid may perhaps be derived from certain of the familiar distinctions based upon the nature and extent of the authority. Thus it is common to say that in its nature the authority may be express or implied; and, as to its extent, that it may be either universal, general or special. It is certain that distinguishable ideas underlie these classifications, however much there may be difference of opinion as to their importance.

I.

EXPRESS AND IMPLIED AUTHORITY

§ 4. WHERE AUTHORITY IS EXPRESS.—*Effect of Limitations.*—It has been seen in another place how the creation of an authority may be either express or implied, and nothing more need now be said upon that particular subject. But in determining the scope of the authority the question whether it is express or implied becomes important.

If the power be an express one, the extent of the authority conferred, and the time, place and manner of its exercise may be expected to be clearly defined. And to the degree to which this is done, the limits fixed are necessarily conclusive upon all parties who have or are charged with notice of them.¹ So, to the extent to which the power is express it is exclusive of every other main power,² for while usage and necessity may often determine the mode in which

¹ *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Brown v. Johnson*, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726; *Chaffe v. Stubbs*, 37 La. Ann. 656; *Rust v. Eaton*, 24 Fed. Rep. 830; *Stainback v. Read*, 11 Gratt. (Va.) 281, 62 Am. Dec. 648; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Wood Mow. & Reap. Machine Co. v. Crow*, 70 Iowa, 340; *Siebold v. Davis*, 67 Iowa, 561; *Bonart v. Oberne*, 36 Kans. 284.

² "No authority will be implied from an express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers will be conceded to the agent by implication." *Jackson v. National Bank*, 92 Tenn. 154, 20 S. W. 820, 36 Am. St. 81, 18 L. R. A. 663.

the power is to be exercised, they cannot operate to change the essential character of the authority conferred.³

Duty to Observe Extent.—Parties dealing with an agent known by them to be acting under an express power, whether the authority conferred be general or special, are bound to take notice of the nature and extent of the authority conferred. They must be regarded as dealing with that power before them, and are bound at their peril to notice the limitations thereto prescribed either by its own terms or by construction of law.⁴

Where Written Authority Exists.—So where the act assumed to be done by the agent is one for which the authority is required by law to be conferred by a written instrument or by a writing under seal, the parties dealing with him must take notice of that fact and they will be bound by any limitations or restrictions contained therein, although they have not had actual knowledge of them.⁵

The fact that the agent signs "per procuration" or "per power of attorney," and the like, is sufficient to put the party dealing with him upon inquiry.⁶

§ 5. WHERE AUTHORITY IS IMPLIED.—The same general principles apply so far as possible where the authority is implied, though from the nature of the case the limits of an implied authority cannot be defined so sharply as where the authority is express. As has been seen in another place, authority is constantly implied from the words and conduct of the parties or from the circumstances of the case. Even here, however, the authority so implied is not without limits; it cannot exceed the necessary and legitimate effect of the facts from which it is so inferred, the facts must be given their natural and appropriate significance, and when the authority is inferred from the recognition or adoption of acts of a certain sort, its scope must

³ *Robinson v. Mollett*, L. R. 7 H. of L. 802, reversing the same case in L. R. 7 C. P. 84.

⁴ *Mt. Morris Bank v. Gorham*, 169 Mass. 519, 48 N. E. 341; *Ferguson v. Davis*, 118 N. C. 946, 24 S. E. 710; *Reeves v. Corrigan*, 3 N. Dak. 415, 57 N. W. 80; *Gorham v. Felker*, 102 Ga. 260, 28 S. E. 1002; *Wells v. Mich. Mut. L. Ins. Co.* 41 W. Va. 131, 23 S. E. 527; *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *Stainback v. Read*, 11 *Gratt. (Va.)* 281, 62 Am. Dec. 648; *The Floyd Acceptances*, 7 *Wall. (U. S.)* 666; *Whiteside v. United States*, 93 U. S. 247; *Lewis v. Commissioners*, 12 *Kans.* 186; *Craycraft v. Selvage*, 10 *Bush (Ky.)* 696; *Dozier v. Freeman*, 47 *Miss.* 647; *Baxter v. Lamont*, 60 *Ill.* 237; *Cruzan v. Smith*, 41 *Ind.* 288; *Blackwell v. Ketcham*, 53 *Ind.* 184; *Silliman v. Fredericksburg, &c.*, R. R. Co. 27 *Gratt. (Va.)* 120; *Snow v. Warner*, 10 *Metc. (Mass.)* 132, 43 *Am. Dec.* 417.

⁵ *Mt. Morris Bank v. Gorham*, 169 Mass. 519, 48 N. E. 341; *Peabody v. Hoard*, 46 *Ill.* 242; *Weise's Appeal*, 72 *Penn. St.* 351; *National Iron Armor Co. v. Bruner*, 19 *N. J. Eq.* 331; *Reese v. Medlock*, 27 *Tex.* 120, 84 *Am. Dec.* 611.

⁶ *Mt. Morris Bank v. Gorham*, *supra*; *Alexander v. Mackenzie*, 6 *C. B.* 766; *Attwood v. Munnings*, 7 *B. & C.* 278.

be limited to the performance of like acts under like circumstances.⁷

And so, as has been elsewhere noticed, the authority, if implied at all, can only be implied from facts. It is not to be created by mere presumption, nor by any abstract considerations, however potent, that it would be expedient or proper or convenient that the authority should exist.⁸ The facts, moreover, must be those for which the principal is responsible. The authority if it exists at all must find its source in the act or acquiescence of the principal, either expressed or implied. If such a source cannot be shown, the authority cannot exist.⁹

II.

THE ELEMENTS OF AUTHORITY

§ 6. AUTHORITY AN ATTRIBUTE OF CHARACTER BESTOWED BY THE PRINCIPAL.—By the creation of the agency, the principal bestows upon the agent a certain character. For some purpose, during some

⁷ See *Graves v. Horton*, 38 Minn. 66, 35 N. W. Rep. 568, where MITCHELL, J., says: "It is true that agency may be proved from the habit and course of dealing between the parties; that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do *such acts*; as, for example, the case of the manager of a plantation in buying supplies for it, or the superintendent of a sawmill in making contracts for putting in logs for the use of the mill, which are the cases cited by respondent. It is also true, as was said in *Wilcox v. Railroad Co.*, 24 Minn. 269 (which involved the question of the authority of the person to whom goods were delivered to receive them), a single act of an assumed agent, and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do *similar acts* for the principal beyond question. It is also true that the performance of subsequent as well as prior acts, authorized or ratified by the principal, may be evidence of agency, where the acts are of a similar kind, and related to a continuous series of acts embracing the time of the act in controversy, as indicating a general habit and course of dealing; as for example, the acts of the president of a railroad company in making drafts in the name of the company, which were honored by it, which was the case of *Olcott v. Railroad Co.*, 27 N. Y. 546, cited by counsel. But we think the books will be searched in vain for a case where it was ever held that authority to negotiate for the sale of property to one person at one time on certain terms, the transfer to be made by the principal in person, was evidence of authority to sell and transfer the same property at some former time to another person on different terms." See also *McAlpin v. Cassidy*, 17 Tex. 449; *Gordon v. Loan & Tr. Co.*, 6 N. Dak. 454, 71 N. W. 556; *Gregory v. Loose*, 19 Wash. 599, 54 Pac. 33; *Halladay v. Underwood*, 90 Ill. App. 130; *Rusby v. Scarlett*, 5 Esp. 76; *Baines v. Ewing*, L. R. 1 Exch. 320; *Day v. Boyd*, 6 Heisk. (Tenn.) 458; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Johnson v. Wingate*, 29 Me. 404; *Washington Bank v. Lewis*, 22 Pick. (Mass.) 24.

Authority cannot usually be inferred from the authorization or adoption of a single act: *Green v. Hinkley*, 52 Iowa 633, 3 N. W. 688; but it may be if the adoption is sufficiently comprehensive and positive. *Wilcox v. Chicago, &c., R. Co.*, 24 Minn. 269.

No inference of authority to sign a contract can properly be drawn from the fact that the alleged agent had on two occasions drawn up and signed contracts dictated by the principal. *Fadner v. Hibler*, 26 Ill. App. 639.

⁸ *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438.

⁹ *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655.

time and to some extent, the agent is to be the *alter ego*,—the other self, of the principal. This purpose, time and extent are determined by the principal to suit the needs or objects which he has in view, and which the agent is expected to accomplish. These, however, are matters in which third persons have no part; they are considered and determined by the principal alone. What third persons are interested in, is, not the secret processes of the principal's mind, but the visible result of those processes,—the character in which the agent is held out by the principal to those who may have occasion or opportunity to deal with him. This character is a tangible, discernible thing, and, so far as third persons are concerned, must be held to be the authorized, as it is the only, expression and evidence from which the principal intends that they shall determine his purposes and objects. They must conclude, and have a right to conclude, that the principal intends the agent to have and exercise those powers, and those only, which necessarily, properly and legitimately belong to the character in which he holds him out.¹⁰

The authority of an agent in any given case, therefore, is an attribute of the character bestowed upon him in that case by the principal. Thus if the principal has by his express act, or as the logical and legal result of his words or conduct, impressed upon the agent the character of one authorized to act or speak for him in a given capacity, authority so to speak and act, follows as a necessary attribute of the character, and the principal having conferred the character will not be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to impose so much authority, or that he had given the agent express instructions not to exercise it.¹¹ The latter question is one to be settled between the agent and himself. It rested with the principal to determine in the first instance what character he would impart, but having made the determination and imparted the character, he must be held to have intended also the usual and legal attributes of that character.

§ 7. THE PROVINCE OF INSTRUCTIONS—*Apparent Authority Cannot be Limited by Secret Instructions*.—It is not to be inferred, however, that third persons have the right to attribute to the agent any powers they please, and by so doing bind the principal. It is lawful for the principal to confer as much or as little authority as he sees fit. He may impose all such lawful restrictions and limitations upon it as he thinks desirable, and these restrictions and limitations will be as binding and conclusive upon third persons who are charged

¹⁰ Cited and approved: *Harrison v. Kansas City Ry. Co.*, 50 Mo. App. 332.

¹¹ Cited and approved: *Hibbard v. Peek*, 75 Wis. 619, 44 N. W. 641; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. 350.

with notice of them as upon the agent, provided the principal has done nothing to waive or nullify them.¹² But on the other hand, instructions or limitations which are not disclosed cannot be permitted to affect apparent powers.

The criterion in this case, as in others, is the character bestowed by the principal. He may not hold the agent out in the character of one having a general or special power, and bind third persons who have relied thereon in good faith, by secret limitations and restrictions upon the agent's authority which are inconsistent with the character bestowed. Although the agent violates his instructions or exceeds the limits set to his authority, he will yet bind his principal to such third persons, if his acts are within the scope of the authority which the principal has caused or permitted him to appear to possess.¹³ But if the agent be not held out as one possessing other than the limited and restricted power, then the instructions and the authority may coincide.

¹² See *Van Santvoord v. Smith*, 79 Minn. 316, 82 N. W. 642; *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360, 11 So. 488, citing and approving text.

¹³ *Munn v. Commission Co.* 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Walker v. Skipwith, Meigs* (Tenn.) 502, 33 Am. Dec. 161; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *Topham v. Roche*, 2 Hill (S. C.) 307, 27 Am. Dec. 387; *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827; *Merchants Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665; *Williams v. Getty*, 31 Penn. St. 461, 72 Am. Dec. 757; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Car-michael v. Buck*, 10 Rich. (S. C.) L. 332, 70 Am. Dec. 226; *Butler v. Maples*, 9 Wall. (U. S.) 766; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Paine v. Tilling-hast*, 52 Conn. 532; *Abbott v. Rose*, 62 Me. 194; *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Murphy v. Southern Life Ins. Co.*, 3 Baxter (Tenn.) 440; *Cruzan v. Smith*, 41 Ind. 288; *Bell v. Offutt*, 10 Bush, (Ky.) 632; *Cosgrove v. Ogden*, 49 N. Y. 255; *Morton v. Scull*, 23 Ark. 289; *Furnas v. Frankman*, 6 Neb. 429; *Willard v. Buckingham*, 36 Conn. 395; *Golding v. Merchant*, 43 Ala. 705; *Adams Express Co. v. Schlessinger*, 75 Penn. St. 246; *Palmer v. Cheney*, 35 Iowa, 281; *Williams v. Mitchell*, 17 Mass. 98; *Odiorne v. Maxcy*, 13 Mass. 178; *Hough v. Doyle*, 4 Rawle (Penn.) 291; *Shelhamer v. Thomas*, 7 Serg. & R. (Penn.) 106; *Wilcox v. Routh*, 9 Smedes & M. (Miss.) 476; *Howry v. Eppinger*, 34 Mich. 29; *Davenport v. Peoria, &c. Ins. Co.*, 17 Iowa 276; *Kane v. Barstow*, 42 Kan. 465, 22 Pac. 588; *Bank v. Everst*, 35 Kan. 687, 12 Pac. 141; *Winchell v. Nat. Expr. Co.*, 64 Vt. 15, 23 Atl. 728; *Hirschorn v. Bradley*, 117 Iowa 130, 90 N. W. 592; *Pacific Biscuit Co.*, 40 Oreg. 362, 67 Pac. 32; *Kansas City, &c. R. Co. v. Higdon*, 94 Ala. 286, 10 So. 282, 33 Am. St. 119; *LaFayette Ry. Co. v. Tucker*, 124 Ala. 514, 27 So. 447; *Rosenberger v. Marsh*, 108 Iowa 47, 78 N. W. 837; *Merchants' Nat. Bank v. Clifton Mfg. Co.*, 56 S. Car. 320, 33 S. E. 750; *Allis v. Voigt*, 90 Mich. 125, 51 N. W. 190; *Hamill v. Ashley*, 11 Colo. 180, 17 Pac. 502; *Wilson v. Assur. Co.*, 51 S. Car. 540, 29 S. E. 245, 64 Am. St. 700; *Ruggles v. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. 674; *Wachter v. Assur. Co.*, 132 Pa. 428, 19 Atl. 289, 19 Am. St. 600; *Brown v. Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. 534; *Sanford v. Ins. Co.*, 174 Mass. 416, 54 N. E. 883; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. 350; *Hall v. Hopper*, 64 Neb. 633, 90 N. W. 549; *Smith v. Droubay*, 20 Utah 443, 58 Pac. 1112; *Shaw v. Williams*, 100 N. Car. 272, 6 S. E. 196.

These rules apply as strongly where the principal was undisclosed at the time of the transaction as where he was disclosed.¹⁴

§ 8. ——*What Constitute Instructions.*—When, however, it has been said that an apparent authority cannot be limited by secret instructions, it still remains to determine what is meant by "secret instructions" within the purview of the rule. In the first place it is necessary to free the case of any odium necessarily to be attached to the word "secret." To do this, the meaning and import of "instructions" must be determined. Here, as in so many other cases, it will be found that the same word is used in a variety of senses. Thus, a master who has a servant already employed and authorized generally to act, may give him "instructions" as to the manner in which he shall act either regularly or upon particular occasions. In this case the instructions constitute no part of the authority: they are simply directions as to how an authority already existing shall be exercised. They may or may not be designed to be kept secret. If, for example, a master puts into the charge of his servant a team of horses and directs him, because the day is hot or the load heavy, to drive slowly, or cautions him on meeting other teams to keep to the right, these directions have no secret character, they do not go to the root of the authority, and the master would undoubtedly be liable to a third person injured because the servant negligently disregarded his instructions and drove too rapidly or ignored the rule of the road. If, on the other hand, a master, who manufactures goods by a secret process, directs his servant how to act but enjoins secrecy as to methods, the secrecy of the instructions may be material to the preservation of the master's monopoly, but that fact neither makes the instructions the authority nor changes the master's liability for injuries caused by their violation.

§ 9. ——Suppose also that an insurance company puts an agent into the field with apparent powers to accept applications, issue policies, receive payment of premiums, and the like, but then or later instructs him not to accept certain risks, not to make oral contracts to insure, not to waive certain conditions, and the like; these directions are instructions merely, they are designed merely to control the manner of acting, and a disobedience of them, while it might make the agent liable to the company, would not relieve the company of liability to a third person who had dealt with the agent in ignorance of them.¹⁵

¹⁴ *Hubbard v. Tenbrook*, 124 Pa. 291, 16 Atl. 817, 10 Am. St. 585, 2 L. R. A. 823; *Watteau v. Fenwick*, L. R. [1893] 1 Q. B. 346.

¹⁵ See, for example, *Brown v. Franklin Mut. F. Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. 537; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. 674; *Wachter v.*

Suppose that an implement company sends out an agent to make contracts of sale, and supplies him with a blank form of contract which by reason of its protective phraseology it directs him to use; the agent nevertheless makes a contract of sale of the general sort contemplated but writes it on other blanks or uses no blank at all. Certainly the direction to use the printed form supplied is a mere instruction, and the company will be bound to a person who was ignorant of it.¹⁶

So if a person puts another in general charge of his store with authority to carry it on in the usual way but directs him not to buy goods of a certain person, not to exceed a certain amount, not to carry certain ordinary goods in stock, and the like, these directions are simply instructions and not limitations upon authority.¹⁷

Further illustrations of this sort are needless, as an indefinite number will immediately suggest themselves. The instructions in these cases have no necessarily secret character. The principal's purposes would be furthered rather than hindered by their disclosure, and he may have relied upon the agent to make them known.

§ 10. ———But suppose that a principal who has a horse for sale authorizes an agent to sell it, but "instructs" him to be careful not to say or do anything which may be construed as a warranty, or not voluntarily to disclose the age or defects of the horse; these instructions may well be intended only for the secret ear of the agent, but they like the others do not go to the matter of the authority to sell.

Suppose again that a principal who has a horse for sale employs an agent to sell it, and as to the price directs him to endeavor to get \$150 but, if he cannot get that, to sell for \$100; these directions as to price are certainly mere instructions and are as certainly designed to be kept secret, because the principal never intended that the agent should say to a prospective purchaser, "the price is \$150, but if you will not pay that, you may have the horse for \$100."

On the other hand, suppose one man to say to another, whom he has not previously employed and who is not a horse buyer or dealer, "Buy for me A's black horse called 'Prince.'" Here clearly is not authority to buy a horse with *instructions* to buy a certain one, but the authority is to buy a certain one only, and the purchase of any

Phoenix Ins. Co., 132 Pa. 428, 19 Atl. 289, 19 Am. St. 600; Wilson *v.* Commercial Un. Assur. Co., 51 S. Car. 540, 29 S. E. 245, 64 Am. St. 700. See also Van Santvoord *v.* Smith, 79 Minn. 316, 82 N. W. 642.

¹⁶ See *Armour v. Ross*, 110 Ga. 403, 35 S. E. 787.

¹⁷ *Harrington v. Bronson*, 161 Pa. 296, 29 Atl. 30; *Hubbard v. Tenbrook*, 124 Pa. 291, 16 Atl. 817, 10 Am. St. 585, 2 L. R. A. 823; *Watteau v. Fenwick*, L. R. [1893] 1 Q. B. 346; *Rhodes Furniture Co. v. Weedon*, 108 Ala. 252, 19 So. 318.

other would not bind the principal. Suppose again that one man says to another, whom he has not previously employed and who is not a horse buyer, "Buy for me a black horse, five years old, fifteen hands high, of Morgan stock, for not more than \$150." What have we here? Is there authority to buy a horse, with *instructions* that it shall be black, of certain age, height, breed and price, or is there authority to buy such a horse and none other? Test it in this way: A proposed seller, endeavoring as he must to ascertain the agent's authority, asks the agent for his authority. What will the agent say? "I am instructed to buy a horse," or "I am instructed to buy a certain sort of horse"? But inasmuch as what the agent may say as to his authority is not conclusive, the proposed seller will inquire of the principal. What will the latter naturally say? "I instructed him to buy me a horse" or "He is authorized to buy only a horse with these characteristics, etc." If the principal is likely to say the former, he clearly regards the specifications as mere instructions. If he is likely to say the latter, as it is believed he would be, then we have a different case. Here the instructions constitute the "authority." They are not secret because the agent's authority can only be shown by disclosing them, they bound and limit the authority, and a departure in any particular would not bind the principal. The instructions here, then, would constitute a real limitation upon the authority.

§ 11. ——It will be apparent upon reflection that directions are more frequently mere instructions (rather than limitations upon authority) in the case of an agent already authorized to do the act than in the case of an agent then for the first time authorized; and more frequently in the case of a "general" agent than a "special" one; but neither of these facts after all is the test. The test is, Were the alleged instructions designed and calculated to fix and determine the character of the agent, or merely to prescribe the manner in which he should exercise the powers incident to a character already or otherwise imposed? Were the alleged instructions designed to be made known to those dealing with the agent or concealed, and, as bearing upon this, would their disclosure promote or defeat the purposes which the principal had in mind? Where their disclosure would defeat his purposes as it pretty clearly would in some of the cases supposed, it is certain that the principal never intended them to be made known. They are in such a case simply instructions and not limitations upon authority.

§ 12. ——But assuming that undisclosed instructions in a given case were actually intended by the principal to be real limitations upon authority, attention must be given to the question, By

whose act or fault were the instructions not disclosed? The mere fact that the person who dealt with the agent was ignorant of them, or that he acted in good faith, or that he believed the agent's authority was subject to no such limitations, is not conclusive: it is ordinarily his duty to know them, and where it is he must not content himself with half inquiry, or go far enough merely to ascertain that some authority exists, but then refrain from ascertaining whether any limitations were imposed upon it. He can only be excused for not knowing the limitations where a proper inquiry has not disclosed them, or where it is clear that they would not have been disclosed upon such an inquiry, or where the principal has led him reasonably to conclude that no such limitations existed and therefore he refrained from inquiry.

The last qualification, however, is one of constant application. If the principal has caused or permitted the agent to appear to have a general or unlimited authority, the third person is at liberty to regard it as such; he is not bound in such a case to suspect limitations or to inquire about restrictions when there is nothing in the character of the agent's apparent authority to suggest them. In as much as the principal by his conduct has caused the authority here to appear to be general or unrestricted, he must give notice of the restrictions if he wishes them to be effective.¹⁸ This rule applies whether the agency is general or special, though inasmuch as a special agency by its very nature suggests the possibility of restrictions the field for the application of the rule is much wider in the case of general agencies.

§ 13. ——Attention must also be given to the question, Of whom shall inquiry as to authority be made? Must the other party go to the principal or may he rely upon the statements of the agent or of strangers? To this question, the law in general gives but one answer: The party dealing with the agent must not rely on what the agent alone may say or do, and *a fortiori* not on what mere strangers say or do, but he must be able to trace the authority on which he relies back to some word or deed of the principal.

It is not meant by this that the party dealing with the agent must

¹⁸ *Wilson v. Commercial Un. Ins. Co.*, 51 S. Car. 540, 29 S. E. 245, 64 Am. St. 700; *Wachter v. Phoenix Assur. Co.*, 132 Pa. 428, 19 Atl. 289, 19 Am. St. 600; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y., 415, 21 N. E. 1000, 11 Am. St. 674; *Brown v. Franklin Mut. F. Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. 534; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883; *Harrington v. Bronson*, 161 Pa. 296, 29 Atl. 30; *Hall v. Hoffer*, 64 Neb. 633, 90 N. W. 549; *Potter v. Springfield Milling Co.*, 75 Miss. 532, 23 So. 259; *Whaley v. Duncan*, 47 S. Car. 139, 25 S. E. 54; *Smith v. Droubay*, 20 Utah 443, 58 Pac. 1112; *Hall v. Union Cent. L. Ins. Co.*, 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288; *Allis v. Voigt*, 90 Mich. 125, 51 N. W. 190; *Hamill v. Ashley*, 11 Colo. 180, 17 Pac. 502; *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827.

always go and make inquiries of the principal in person. He may rely on evidence furnished by the principal, and that evidence may consist of facts and circumstances, of things done and things omitted, of words and acts,—provided always that it can be shown that the principal did in fact supply this evidence, that it was adequate to the purpose, and that it had not spent its force. What the agent himself said or did is ordinarily immaterial, unless the principal's assent or acquiescence in it can also be shown. Limitations upon the agent's authority cannot be defeated simply because the agent failed to disclose them or even denied their existence.¹⁹ There must be some act of the principal reasonably to be construed as waiving their operation or as indicating their non-existence.

Ordinarily in our law it is not within the power of an agent to bind his principal by the evidence which he alone puts forward as to his own authority. The principal may, of course, give him that power. He may supply him with documentary or other evidence to be exhibited; he may refer persons to him to disclose his authority; he may agree to be bound by whatever the agent may assume to do; and all this may be done expressly or impliedly, and where it is done the principal will be bound accordingly. These cases, however, are exceptional and anomalous.

§ 14. ELEMENTS OF AUTHORITY.—*Powers Intentionally and Directly Conferred.*—In determining the question of the existence and extent of the agent's authority, the starting point must, of course, be to ascertain the powers, if any, which were expressly, consciously and intentionally conferred by the principal upon the agent. Any act so authorized binds the principal upon the clearest doctrines of agency, and for this reason questions in this field very rarely arise.

But around this nucleus of express powers there often gathers an area of implied and incidental powers; and in many cases there may never have been any formal and express conferring of powers but the whole matter must be determined by inference and construction.

§ 15. IMPLIED AND INCIDENTAL POWERS.—It is a fundamental principle in the law of agency that every delegation of power carries with it, unless the contrary be expressed, implied authority to do all those things which are reasonably necessary and proper to carry into effect the main power conferred. This doctrine rests upon the presumed intention of the principal that the main power shall not fail for lack of express authority to do the incidental acts reasonably

¹⁹ Since an agent cannot bind his principal by any express statement as to his authority he "cannot by mere silence concerning limitations on his authority, render such limitations ineffective." *Mitrovich v. Fresno Fruit Packing Co.*, 123 Cal. 379, 55 Pac. 1064.

necessary to make that power effective.²⁰ Prohibitions against the exercise of such incidental powers could not affect third persons reasonably dealing with the agent in ignorance of them.

So where an agent is employed in a professional capacity or in a character or occupation to which certain powers are ordinarily and naturally incident, authority to exercise such incidental powers will be implied; and as in other cases this authority, so far as third persons are concerned, is not to be cut off by secret instructions not to exercise it.

§ 16. ———*Powers Conferred by Usage.*—Usage also may operate to affect the range of an agent's powers. Where the principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well defined and publicly known usage, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage, and third persons, therefore, who deal with the agent in good faith and in the exercise of reasonable prudence, will be protected against limitations upon the usual authority, of which they had no notice.²¹

²⁰ "An agent to conduct a given business for his principal necessarily has authority to do everything which is essential to the performance of his duties as agent." *Baldwin v. Garrett*, 111 Ga. 876, 36 S. E. 966; *National Bank v. Old Town Bank*, 112 Fed. 726, 50 C. C. A. 443. In *Jackson v. Bank*, 92 Tenn. 154, 20 S. W. 802, 36 Am. St. R. 81, it is said: "No authority will be implied from an express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers will be conceded to the agent by implication. In order, therefore, that the authority to make or draw, accept and indorse commercial paper as the agent of another may be implied from some other express authority, it must be shown to be strictly necessary to the complete execution of the express power. The rule is strictly enforced that the authority to execute and indorse bills and notes as agent will not be implied from an express authority to transact some other business, unless it is absolutely necessary to the exercise of express authority."

Where the transaction of business absolutely requires the power to borrow money in order to carry it on, then the power is conferred as an incident to the employment. But it must be absolutely necessary not merely more effectual, convenient or advantageous. *Consolidated Nat. Bank v. Pac. Coast Steamship Co.*, 95 Cal. 1, 30 Pac. R. 96, 29 Am. St. R. 85.

²¹ *Watts v. Howard*, 70 Minn. 122, 72 N. W. 840; *Western v. Page*, 94 Wis. 251, 68 N. W. 1003; *Milwaukee Invest Co. v. Johnston*, 35 Neb. 554, 53 N. W. 475; *Durkee v. Carr*, 38 Oreg. 189, 63 Pac. 117; *Rohrburgh v. U. S. Expr. Co.*, 50 W. Va. 148, 40 S. E. 398; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865; *Kansas City, &c., R. Co. v. Higdon*, 94 Ala. 286, 10 So. 282, 33 Am. St. 119; *Mabray v. Kelly-Goodfellow Shoe Co.*, 73 Mo. App. 1; *Cawthorn v. Lusk*, 97 Ala. 674, 11 So. 731; *Bailey v. Bensley*, 87 Ill. 556; *Phillips v. Moir*, 69 Ill. 155; *Adams v. Pittsburgh Ins. Co.*, 95 Penn. St. 348, 40 Am. Rep. 663; *Williams v. Getty*, 31 Penn. St. 461, 72 Am. Dec. 757; *Chouteau v. Leech*, 18 Penn. St. 224, 57 Am. Dec. 602; *McMasters v. Pennsylvania R. R. Co.*, 69 Penn. St. 374, 8 Am. Rep. 264; *York County Bank v. Stine*, 24 Md. 447; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Mount Olivet Cemetery v. Shubert*, 2 Head (Tenn.) 116; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Greely v. Bartlett*, 1 Greenl. (Me.) 172, 10 Am. Dec. 54; *Day v. Holmes*, 103 Mass. 306; *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Smith v. Tracy*, 36 N. Y. 79; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Frank v. Jenkins*, 22 Ohio St. 597;

In order to give the usage this effect it must be reasonable;²² it must not violate positive law;²³ it must be shown by clear and satisfactory evidence;²⁴ and it must have existed for such a time, and become so widely and generally known, as to warrant the presumption that the principal had it in his view at the time of the appointment of the agent.²⁵ But if the usage was a purely local and particular one, the principal may ordinarily repel this presumption of knowledge by showing that in fact he had no notice of it.²⁶ Where, however, the agent, for example a broker or factor, is authorized to deal in a particular place or market, as upon a certain stock exchange, at which particular rules or usages prevail, it is presumed, in the absence of evidence to the contrary, that the principal expected and intended that the agent should conform to such rules and usages, although in fact the principal may have been ignorant of what they were. This is upon the ground that the principal as a reasonable man must have anticipated that such rules and usages were likely to prevail and therefore must have authorized the dealing in contemplation of them, where no contrary intention was disclosed.²⁷

The same doctrine, with some conflict as to its application to the

Willard v. Buckingham, 36 Conn. 395; *Randall v. Kehlor*, 60 Me. 37; *Upton v. Suffolk County Mills*, 11 CUSH. (Mass.) 586, 59 Am. Dec. 163; *Pickert v. Marston*, 68 Wis. 465, 60 Am. Rep. 876; *Larson v. Aultman*, 86 Wis. 281, 56 N. W. 915; *American Cent. Ins. Co. v. McLanathan*, 11 Kans. 533; *Brady v. Todd*, 9 C. B. (N. S.) 592; *Pollock v. Stables*, 12 Q. B. 755; *Sutton v. Tatham*, 10 Ad. & El. 27.

The other party, of course, cannot rely on the usage in the face of a known limitation. *Smith v. Provident L. Assn. Co.*, 65 Fed. 765, 13 C. C. A. 284.

The authority of a public agent cannot be enlarged by custom. *State v. Chilton*, 49 W. Va. 453, 39 S. E. 612; *Walters v. Senf*, 115 Mo. 524, 22 S. W. 511.

²² *Merchants' Ins. Co. v. Prince*, 50 Minn. 53, 52 N. W. 131, 36 Am. St. 626; *Knowles v. Dow*, 22 N. H. 387, 55 Am. Dec. 163; *Minnesota Cent. R. R. Co. v. Morgan*, 52 Barb. (N. Y.) 217; *Wadley v. Davis*, 63 Barb. (N. Y.) 500.

²³ *Commonwealth v. Cooper*, 130 Mass. 285; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756.

²⁴ *Greenwich Ins. Co. v. Waterman*, 54 Fed. 839; *Rhodes v. Belchée*, 36 Oreg. 141, 59 Pac. 117.

²⁵ *Adams v. Pittsburgh Ins. Co.*, 95 Penn. St. 248, 40 Am. Rep. 663; *Citizens' Bank v. Grafflin*, 31 Md. 507, 1 Am. Rep. 66; *Smith v. Wright*, 1 Caines (N. Y.) 43, 2 Am. Dec. 162; *Porter v. Hills*, 114 Mass. 106; *Fowler v. Pickering*, 119 Mass. 33; *Milwaukee Invest. Co. v. Johnston*, 35 Neb. 554, 53 N. W. 475.

²⁶ *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Bradley v. Wheeler*, 44 N. Y. 500; *Higgins v. Moore*, 34 N. Y. 417; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; *Fisher v. Sargent*, 10 CUSH. (Mass.) 250; *Caldwell v. Dawson*, 4 Metc. (Ky.) 121; *Pennell v. Delta Transp. Co.*, 94 Mich. 247, 53 N. W. 1049.

²⁷ *Taylor v. Bailey*, 169 Ill. 181, 48 N. E. 200; *Cothran v. Ellis*, 107 Ill. 413; *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499; *Union Stock Yards Co. v. Mallory*, 157 Ill. 554, 41 N. E. 888, 48 Am. St. 341; *Bailey v. Bensley*, 87 Ill. 556; *Lyon v. Culbertson*, 83 Ill. 33; *U. S. L. Insurance Co. v. Advance Co.*, 86 Ill. 549; *Byrne v. Schwing*, 6 B. Mon. (Ky.) 199; *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 881, 21 L. R. A. 102; *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239, 79 S. W. 124.

usage of a single bank rather than to the usages of the place, has been extended to the case of banks authorized to collect.²⁸

The customs of a particular trade, or the habits of dealing of the particular parties, may also be material if the parties are found to have dealt with reference to them.

Usage may also operate to limit authority, as well as to enlarge it, under the same conditions as in the latter case.²⁹

Usage, however, cannot operate to change the intrinsic character of the relation,³⁰ nor will it be permitted as between the principal and the agent, or as between the principal and third persons having notice of it, to contravene express instructions,³¹ or to contradict an express contract³² to the contrary. So a usage not known to the principal, cannot operate to authorize the making of an invalid instead of a valid contract, or to bind him to take one thing when he has ordered another.³³

§ 17. ——— *Authority by Estoppel.*—So far as powers depend upon what is usual in similar cases, and so far as they are regarded as incidental to the main power conferred, they do not rest upon the doctrine of estoppel, but are inferences of fact tracing their origin to the same source as the main power itself. So far as third persons are concerned, who can know only that which is open to be learned, they constitute part of the actual authority though commonly included under the description of apparent authority. In other words, so far as third persons are concerned, this apparent authority is included in the real authority. There seems to some to be an inconsistency here

²⁸ See 1 Morse on Banks, § 221; Miles *v.* U. S. Bank, 11 Wheat. (U. S.) 431; Washington Bank *v.* Triplett, 1 Pet. (U. S.) 25; Farmers' Bank *v.* Newland, 97 Ky. 464, 31 S. W. 38; Carolina Nat. Bank *v.* Wallace, 13 S. Car. 347, 36 Am. Rep. 694.

Compare Jefferson County Bank *v.* Commercial Bank, 98 Tenn. 337, 39 S. W. 338; Sahlien *v.* Lonoke Bank, 90 Tenn. 221, 16 S. W. 378; Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 10 Am. St. 669; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Bank of Commerce *v.* Miller, 105 Ill. App. 224.

²⁹ Where the principal relies upon custom to impose restrictions he must show that it was so universal that the other party can well be presumed to have known of it. Bentley *v.* Doggett, 51 Wis. 224, 37 Am. Rep. 827.

³⁰ Robinson *v.* Mollett, 1 L. R. 7 H. of L. 802; Gates Iron Works *v.* Denver Engine Works, 17 Colo. App. 15, 67 Pac. 173.

³¹ Barksdale *v.* Brown, 1 Nott. & M. (S. C.) 517, 9 Am. Dec. 720; Hall *v.* Storrs, 7 Wis. 253; Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467; Hutchings *v.* Ladd, 16 Mich. 493; Leland *v.* Douglass, 1 Wend. (N. Y.) 490; Clark *v.* Van Northwick, 1 Pick. (Mass.) 343; Catlin *v.* Smith, 24 Vt. 85; Day *v.* Holmes, 103 Mass. 306; Parsons *v.* Martin, 11 Gray (Mass.) 112.

³² Brown *v.* Foster, 113 Mass. 136, 18 Am. Rep. 463; Randall *v.* Smith, 63 Me. 105, 18 Am. Rep. 200; Rogers *v.* Woodruff, 23 Ohio St. 632, 13 Am. Rep. 276; Grinnell *v.* Western Union Tel Co., 113 Mass. 299, 18 Am. Rep. 485.

³³ Perry *v.* Barnett, 15 Q. B. Div. 388.

which has given rise to considerable discussion,³⁴ but the situation is believed to be no more anomalous than in the numerous other cases in the law of contract and of crime wherein for practical purposes it is essential that the law shall determine intention from the voluntary manifestations of it by the person concerned.³⁵

When, however, the power is not one included within the usual or the incidental, but is one sought to be deduced from special circumstances of recognition, acquiescence or holding out, the principle of estoppel must be invoked. The act is not within either the real or the apparent authority (using apparent in the sense above indicated) but the party insists that he was led by the special circumstances reasonably to believe that the authority existed and that he has acted upon that belief in such a way that he will be prejudiced if the authority be denied.

The chief practical difference between the two cases is found in the fact that in the former it is not essential that the person seeking to enforce the authority should actually have known and relied upon the inference of usage or natural incident (any more than it is essential in any case of authority that the person who ultimately seeks to enforce it shall have relied upon it at the time as, for example, in the case of an undisclosed principal), while in the latter case it is the essence of his complaint that he was led by the circumstances in question to rely upon the existence of the authority, and proof of his knowledge and reliance upon them must be made.³⁶

§ 18. ——There is, in many places, a tendency to include under the one head of "apparent powers" those deduced from usage or from the character in which the agent is authorized to act, and also those resulting from estoppel. In very many cases it is entirely immaterial practically because there is enough in the proof to satisfy the requirements of either rule; and in many cases also usage and estoppel may unite to account for the powers exercised.

In its legitimate sphere, however, there is a large and important field for the operation of estoppel, and it is constantly relied upon to sustain powers in whose existence the party complaining has reasonably been led to believe by the words or conduct of the alleged principal.

§ 19. ——Inasmuch as the whole doctrine of powers by estop-

³⁴ See 13 Green Bag 50; 15 Harvard Law Review 324; 16 Harvard L. Rev. 186; 5 Columbia Law Review 36; 5 Columbia Law Review 354; 5 Columbia Law Review 456; 5 Columbia Law Review 261; 6 Columbia Law Review 34.

³⁵ See Holland's Jurisprudence (9th ed.) p. 250, Pollock on Contract (7th ed.) pp. 2, 5.

³⁶ See Domasek *v.* Kluck, 113 Wis. 336, 89 N. W. 139; Gosliner *v.* Grangers' Bank, 124 Cal. 225, 56 Pac. 1029; Rodgers *v.* Peckham, 120 Cal. 238, 52 Pac. 483; Maxey *v.* Heekethorn, 44 Ill. 437; Rawson *v.* Curtis, 19 Ill. 456; Cash *v.* Taylor, 8 L. J. K. B. 262.

pel rests upon the theory that the other party has been led to rely upon appearances to his threatened detriment, it is obvious that the doctrine can apply only in those cases in which this element of reliance was present. It can therefore apply only to cases in which credit has been extended, action has been induced, delay has been obtained, or some other change of position has occurred, in reliance upon the appearance of authority, and not to cases of mere tort, such as negligence, trespass, assault. Actions based upon the contract furnish, of course, the most frequent opportunity, but actions for deceit or misrepresentation may also be included within the category.³⁷ Reliance upon appearances, however, does not ordinarily induce to assault, slander, trespass, or negligent injury, and the cases must be very rare, if any, in which it could be an element.³⁸

§ 20. ——— *Authority by ratification.*—And, lastly, it must be kept in mind, in making up the extent of the authority which may be exercised in a given case, that subsequent ratification may supply the lack of prior authorization. What the circumstances are under which this principle may be invoked have been so fully treated in another place that they do not need to be considered here.

§ 21. WHAT CONSTITUTES AUTHORITY.—*Recapitulation.*—Putting all of these principles together, it will be seen that the authority of the agent, so far as it concerns the rights of third persons, may be a composite matter made up of a number of elements. It consists:

First, and primarily, of the powers directly and intentionally conferred by the voluntary act of the principal.³⁹

Second, of those incidental powers which are reasonably necessary and proper to carry into effect the main powers conferred and which are not known to be prohibited.

Third, of those powers which usage and custom have added to the main powers, and which the parties are to be deemed to have had in contemplation at the time of the creation of the agency, and which are not known to have been forbidden.

Fourth, of all such other powers as the principal has, by his direct act or by negligent omission or acquiescence, caused or permitted

³⁷ See *Griswold v. Gebbie*, 126 Pa. 353, 17 Atl. 673, 12 Am. St. 878.

³⁸ *Stables v. Eley*, 1 C. & P. 614, did of course give some color to the opposite view, but that case has long since been repudiated. See Pollock's *Dig. Partn.* (6th ed.) 54; *Lindley, Partn.* 214; *Smith v. Bailey* [1891] 2 Q. B. 403. Compare *Sherrod v. Langdon*, 21 Iowa 518; *Maxwell v. Gibbs*, 32 Iowa 32; *Shepard v. Hynes*, 104 Fed. 449, 45 C. A. 271, 52 L. R. A. 675.

³⁹ This of course follows directly as the result of the maxim, *Qui facit per alium, facit per se.*

persons dealing with the agent reasonably to believe that the principal had conferred.

Fifth, of all those other powers whose exercise by the agent, the principal has subsequently, with full knowledge of the facts, ratified and confirmed.

For the acts done in pursuance of those powers which were directly conferred or which were incidental to those powers and not prohibited, the principal is of course responsible, because they are the direct result of his voluntary and intentional act. He is likewise responsible, and for the same reasons, for those acts which he has intentionally led third persons to believe that he had authorized. He is responsible for the acts of the agent which he has, by negligent omission or acquiescence, led the persons dealing with the agent to believe he has authorized, because to deny them would be a fraud upon innocent persons.⁴⁰ He is responsible for those acts which he has subsequently ratified and confirmed, upon the ground that such a ratification is equivalent to a precedent authority.

As between the agent and the principal the authority would consist of the same elements as in the case of third persons, with the exception that the forbidden powers and secret limitations which would not affect third persons who were ignorant of them, bind the agent who must necessarily have knowledge of them.

III.

UNIVERSAL, GENERAL AND SPECIAL AGENCIES.

§ 22. IN GENERAL.—The common classification of agencies, based upon the extent of the authority conferred, into universal, general and special, has already been referred to in another place. As has been stated, cases of true universal agency are very rare. They can

⁴⁰ The general rule is so well stated by DEPUE, J., in *Law v. Stokes*, 3 Vroom (N. J.) 249, 90 Am. Dec. 655, as to warrant its full quotation: "A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it or is necessary to its performance. Beyond that he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible; because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established it cannot, on the one hand be qualified by the secret instructions of the principal, nor on the other hand be enlarged by the unauthorized representations of the agent."

only be created by clear and unequivocal language and will not be inferred from any general expressions, however broad.⁴¹ No special attention therefore will be given to them in this connection, what may be said in reference to general agencies applying *a fortiori* to the universal.

The more or less vague nature of the distinction between the general and the special agency, and the difficulty experienced in defining it, have also been referred to in another place. Notwithstanding this difficulty, however, the distinction has a root in a certain real difference—albeit a difference of degree and not of kind—though, as will be seen, the distinction has doubtless often been too greatly magnified. It has, at any rate, such a place in our law that any general discussion of the existence, nature and extent of an agent's authority must take it into account.

§ 23. GENERAL AND SPECIAL AUTHORITY.—Consideration has already been given to the question of the general nature of authority, and the elements which compose it, and some general principles have been stated which were deemed applicable to the subject. These principles apply to all cases. If by express appointment, or by long acquiescence, recognition or course of dealing, one man has held another out to the world in the character of one possessing the requisite authority to represent him in a general way in the transaction of all of his business of a certain kind, or at a particular place, or to perform all acts of a certain kind or class, he must be held to have conferred upon him the attributes and powers inherent in the character so bestowed. Such an agent, the law denominates, for convenience sake, a general agent.

But if, on the other hand, in a single instance, either by express terms or by his conduct, he holds the other out to the world in the character of one having authority to do a single thing, perhaps in a specific way, he must be held to have conferred upon him those attributes and powers, and those only, which are inherent in that character. This agent, for the same convenience, is termed a special agent.

In either case, the question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the *character* bestowed and not upon the *instructions* given. Or, in other words, the principal is bound to third persons who have relied thereon in good faith and in ignorance of any limitations or restrictions, by the *apparent* authority he has given to the agent, and not by the *actual* or *express* authority

⁴¹ *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728.

where that differs from the apparent, and this, too, whether the agency be a general or a special one.⁴²

But, as has already been observed, it is not by any means to be inferred that the apparent and the actual authority can never coincide, or that the agent has, in all cases, an indefinite quantum of power beyond or regardless of his instructions. The actual and the apparent authority are naturally and primarily the same, and if, in any given case, it be held that the apparent exceeds the actual, it is because the principal has, by his own act or omission, caused it to be so. The law never indulges in the bare presumption that they are not identical. Indeed, as has been pointed out, this distinction between the actual and apparent authority is in this connection misleading. So far as third persons are concerned the apparent authority must be regarded as the real authority, where they have no knowledge or notice to the contrary.

§ 24. SAME SUBJECT.—The distinction between a general and a special agency has been deemed to be one of great importance, and a large number of decisions have been made to turn upon it. It is believed, however, that the distinction, as it is ordinarily drawn, is

⁴² Quoted with approval in *Whitton v. Sullivan*, 96 Cal. 480, 31 Pac. 1115. It has been said by a learned judge: "The authority of a general agent may be more or less extensive; and he may be more or less limited in his action within the scope of it. The limitation of his authority may be public or private. If it be public, those who deal with him must regard it, or the principal will not be bound. If it be private the principal will be bound when agent is acting within the scope of his authority, although he should violate his secret instructions. A special agent is one employed for a particular purpose only. He also may have a general authority to accomplish that purpose, or be limited to do it in a particular manner. If the limitation respecting the manner of doing it be public or known to the person with whom he deals, the principal will not be bound if the instructions are exceeded or violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts." *SHEPLEY*, J., in *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96. And by another: "Where the authority is limited in a *bona fide* manner, and the limitation is to be disclosed by the agent and is disclosed either with or without inquiry, any departure from such authority or instructions will not bind the principal; but where the authority or instructions given are in the nature of private instructions and so designed to be, they will not be binding upon the parties dealing with the agent. And if the instructions are of such a nature that they would not be communicated if an inquiry was made, (even though it be the duty of the person dealing with the agent to make the inquiry) it is not necessary that it should be made for it would not be communicated if made." *EASTMAN*, J., in *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195.

"While the rule is that an agent must act within the scope of his authority, yet when the agent's act affects innocent third parties the principal will be bound to the extent of the apparent authority conferred by him on his agent. A principal is bound equally by the authority which he actually gives, and by that which by his own act he appears to give." *Webster v. Wray*, 17 Neb. 579. See also *Van Duzer v. Howe*, 21 N. Y. 531; *Redlich v. Doll*, 54 N. Y. 234; *Garrard v. Haddan*, 67 Penn. St. 82, 5 Am. Rep. 412; *Hatch v. Taylor*, 10 N. H. 538; *Carmichael v. Buck*, 10 Rich. (S. C.) 332, 70 Am. Dec. 226.

highly artificial and unsatisfactory, if not positively misleading, and that it might well be dispensed with.

The importance of this distinction, has been said by Mr. Parsons,⁴³ whose language has been much quoted, to lie in the rule that "if a particular agent exceed his authority, the principal is not bound; but if a general agent exceed his authority, the principal is bound, provided the agent acted within the ordinary and usual scope of the business he was authorized to transact, and the party dealing with the agent did not know that he exceeded his authority." This rule, however, cannot be regarded as strictly accurate. So far as the rights of third persons, who have no knowledge of limitations on his authority are concerned,—and this is what the rule given contemplates,—the agent must be deemed to have authority to do those acts which are within the ordinary and usual scope of the business he was empowered to transact. Such an act therefore cannot be deemed to be in excess of his authority. The very fact that it is, under such circumstances, declared to be binding upon the principal necessarily presupposes that it was authorized. On the other hand, if the agent really exceeded his authority the principal could not be bound whether the agency be a general or a special one. The difficulty with this rule is that it fails to discriminate between *instructions* and *authority*.

But many statements of the rule go still further and it is frequently declared that if the special agent exceeds his instructions the principal is not bound; while if the general agent exceeds his instructions, the principal will be bound. This statement is still more misleading than the other, and no little confusion has crept in to the books because of it. As has been seen instructions, even in case of a special agent, are not in every case the measure of power. They *may* exactly encompass the authority, but they do not *necessarily* do so. They may be intentionally or negligently waived or disregarded by the act of the principal. Even in the case of a special agent, it is the character bestowed,—the apparent authority conferred,—which is the test, and not the instructions given.

That Mr. Parsons himself was not misled by this distinction is evident from what he says further on: "We think the distinction between a general agency and a special agent useful, and sufficiently definite for practical purposes, although it may have been pressed too far, and relied upon too much in determining the responsibility of a principal for the acts of an agent. It may, indeed, be said that every agency is, under one aspect, special, and under another, gen-

⁴³ Parsons on Contracts (9th ed.) Vol. I., p. 42. Same, Broom on Common Law (8th ed.) 575.

eral. No agent has authority to be in all respects and for all purposes an *alter ego* of his principal, binding him by whatever the agent may do in reference to any subject whatever; and, therefore the agency must be special so far as it is limited by place or time, or the extent or character of the work to be done. On the other hand every agency must be so far general that it must cover not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it. Of late years, courts seem more disposed to regard this distinction and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency, namely, that a principal is responsible, either when he has given to an agent sufficient authority, or, when he justifies a party dealing with his agent in believing that he has given to this agent this authority.”⁴⁴

§ 25. ————— *The True Distinction.*—But it is none the less true that the scope of the authority of a special agent is ordinarily much more restricted than that of a general agent. The fact that the authority is conferred in a special instance, to do a specific act naturally leads to, if it does not positively require, much more minuteness of direction and much greater restrictions and limitations. From the very nature of the case, particularity of instructions and singleness of method are to be expected, and of this persons dealing with the agent may well be required to take notice.⁴⁵

On the other hand, where the agent is authorized to transact all the principal’s business of a certain kind, or all the acts of a certain class, the very breadth of the employment and the variety of the duties to be performed necessarily involve more or less of discretion and choice of methods, and render impracticable, if not impossible, much of particularity or precision, either as to the exact means and method to be employed, or as to the scope or extent of the authority itself. Where so little is expressed, more may well be implied. The fact of such an authority, of itself, presupposes a general confidence bestowed upon the agent, and a general committal to his discretion and judgment of all beyond the essential objects to be attained and the outlines of the course to be pursued. It may not unreasonably be presumed, where nothing is indicated to the contrary, that such an

⁴⁴ Contracts (9th ed.) Vol. I., pp. 43-44, quoted with approval in *Gore v. Canada L. Ins. Co.*, 119 Mich. 136, 77 N. W. 650. “There are in the books many loose expressions concerning the distinction between a general and a special agency. The distinction itself is highly unsatisfactory and will be found quite insufficient to solve a great variety of cases. It is unprofitable to dwell on that distinction.” *Comstock, J.*, in *Mechanics’ Bank v. New York, &c.*, R. R. Co., 13 N. Y. 632. See also *Cross v. Atchison, &c.*, Ry. Co., 141 Mo. 132, 44 S. W. 675.

⁴⁵ Quoted with approval in *Bleeker v. Satsop R. Co.*, 3 Wash. 77, 27 Pac. 1073.

agent possesses those powers which are commensurate with his undertaking, and which are usually and properly exercised by other similar agents under like circumstances. This presumption may well be and is constantly relied upon by persons dealing with such agents, and so reasonable, proper and necessary is this reliance, that it may justly be required that if the principal would impose unusual restrictions upon the authority of such an agent, he should make them known to persons who may have occasion to deal with the agent.

And herein, it is believed, lies the true distinction between these two classes of authority. One is in its nature limited and implies limitations of power. Of these limitations third persons must inform themselves, unless the principal has by his words or conduct held out the agent as one upon whose authority such limitations are not imposed.⁴⁶ The other is, in its nature, general and unrestricted by other limitations than those which confine the authority within the bounds of what is usual, proper and necessary under like circumstances. If there are other limitations, the principal must disclose them.⁴⁷

Neither of these rules dispenses with that which devolves upon every person the duty of ascertaining not only the fact of the agency but also the nature and extent of the authority which the principal has apparently conferred. And neither of them permits that authority to be defeated by secret limitations.

§ 26. GENERAL AGENCY NOR UNLIMITED.—It is not, however, to be supposed that the general agent's authority is entirely unlimited. He is far from being a universal agent or a mere autocrat, and while his apparent authority is not to be restricted by undisclosed limitations, it must, on the other hand, be confined to such transactions and concerns as are incident and appurtenant to the business of his principal and to that branch of the business which is entrusted to his care;⁴⁸ unusual and unnatural acts are not to be tolerated; strained

⁴⁶ *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; *Ferguson v. Davis*, 118 N. C. 946, 24 S. E. 710; *Cleveland v. Pearl*, 63 Vt. 127, 21 Atl. 261, 25 Am. St. 748; *Brown v. West*, 69 Vt. 440, 38 Atl. 87; *Montgomery Furniture Co. v. Hardaway*, 104 Ala. 100, 16 So. 29; *Yates v. Yates*, 24 Fla. 64, 3 So. 821; *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480, 32 S. E. 591.

⁴⁷ *Hirschhorn v. Bradley*, 117 Iowa 130, 90 N. W. 592; *Liddell v. Sahline*, 55 Ark. 627, 17 S. W. 705; *Catholic Bishop v. Troup*, 61 Ill. App. 641; *Harrington v. Bronson*, 161 Pa. 296, 29 Atl. 30; *Hall v. Hoffer*, 64 Neb. 633, 90 N. W. 549; *Potter v. Springfield Milling Co.* 75 Miss. 532, 23 So. 259; *Whaley v. Duncan*, 47 S. Car. 139, 25 S. E. 54; *Smith v. Droubay*, 20 Utah 443, 58 Pac. 1112; *Hall v. Union Cent. L. Ins. Co.*, 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288; *Allis v. Voigt*, 90 Mich. 125, 51 N. W. 190; *Hamill v. Ashley*, 11 Colo. 180, 17 Pac. 502; *Ruggles v. Am. Cent. Ins. Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. 674; *Brown v. Franklin Mut. L. Ins. Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. 534; *Wachter v. Phoenix Assur. Co.*, 132 Pa. 428, 19 Atl. 289, 19 Am. St. 600.

⁴⁸ See *Odiorne v. Maxcy*, 13 Mass. 178; *Stewart v. Woodward*, 50 Vt. 78, 28 Am. Rep. 488, and other cases.

constructions are to be avoided; inferences of fact are to be limited to those which are reasonable, natural and ordinary; and, as has been so often pointed out, inferences are to be drawn only from facts for which the principal is responsible and not from mere considerations of convenience or policy. The mere fact that one is found to be a general agent justifies neither court nor jury in guessing that given acts are within the scope of his authority.⁴⁹

§ 27. GENERAL AGENT BINDS PRINCIPAL ONLY WITHIN THE SCOPE OF HIS AUTHORITY.—The general agent, therefore, binds his principal when, and only when, his act is justified by the authority conferred upon him. This authority being in its nature general and not specific, being often gathered from a variety of sources and composed of different elements, the question of its sufficiency becomes largely one of fact, and may be stated thus:

Having in mind the powers expressly conferred, making all justifiable inferences, taking into consideration the object to be attained and the means open to adoption, giving due weight to such usages as were had in contemplation, considering whatever of extension or of modification has been wrought by subsequent conduct, either by way of estoppel or ratification, is the act in controversy included within the limits, or, as it is ordinarily stated, within the scope, of this authority? If it is, the principal is bound; if it is not, the act of the agent binds himself alone or no one.⁵⁰

§ 28. SPECIAL AGENT'S AUTHORITY MUST BE STRICTLY PURSUED.—The authority of the special agent being in its nature limited,—suggesting restrictions and qualifications which may be discovered upon investigation,—its scope is much more easy of determination and must not be exceeded; or, as the rule is ordinarily stated, his authority must be strictly pursued, and if it is not,

⁴⁹ *Gore v. Canada Life Assur. Co.*, 119 Mich. 136, 77 N. W. 650.

⁵⁰ *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Goodloe v. Godley*, 13 Smedes & M. (Miss.) 233, 51 Am. Dec. 159; *Keener v. Harrod*, 2 Md. 63, 56 Am. Dec. 706; *McCoy v. McKown*, 26 Miss. 487, 59 Am. Dec. 264; *Carmichael v. Buck*, 10 Rich. (S. C.) L. 332, 70 Am. Dec. 226; *Savings Fund Society v. Savings Bank*, 36 Penn. St. 498, 78 Am. Dec. 390; *Coweta Falls Mnfg. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602; *Asher v. Sutton*, 31 Kans. 286; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *Reed v. Ashburnham R. R.*, 120 Mass. 43; *Abrahams v. Weiller*, 87 Ill. 179; *Lewis v. Shreveport*, 108 U. S. 282; *Booth v. Wiley*, 102 Ill. 84; *Nicholson v. Moog*, 65 Ala. 471; *American Express Co. v. Milk*, 73 Ill. 224; *Kelton v. Leonard*, 54 Vt. 230; *Lewis v. Bourbon*, 12 Kans. 186; *Dodge v. McDonnell*, 14 Wis. 553; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *Ward's, &c. Co. v. Elkins*, 34 Mich. 439; *New York Life Ins. Co. v. McGowan*, 18 Kans. 300; *Morton v. Scull*, 23 Ark. 289; *Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647; *Planters' Ins. Co. v. Sorrells*, 1 Baxter (Tenn.) 352; *Noble v. Cunningham*, 74 Ill. 51.

the principal will not be bound.⁵¹ A person dealing with a special agent, it is constantly said, "acts at his own peril,"⁵² he is "put upon inquiry,"⁵³ he is "chargeable with notice of the extent of his authority,"⁵⁴ "it is his duty to ascertain,"⁵⁵ "he is bound to inquire,"⁵⁶ "and if he does not, he must suffer the consequences."⁵⁷

It is none the less true, however, as has been seen, that the scope of the general agent's authority must not be exceeded. Each acting within the scope of the authority conferred, binds his principal; each acting beyond that scope binds himself only or no one. But while these rules applying to the two classes are alike in kind, they differ, as has been shown, in degree. It is believed, however, that the difference is one of degree only, and not of principle.

IV.

ASCERTAINING THE EXISTENCE OF AUTHORITY.

§ 29. PERSONS DEALING WITH AGENT MUST ASCERTAIN HIS AUTHORITY.—In approaching the consideration of the inquiry whether an assumed authority exists in a given case, there are certain fundamental principles which must not be lost sight of. Among these are, as has been seen, that the law indulges in no bare presumptions that an agency exists, it must be proved or presumed from facts; that the agent cannot establish his own authority, either by

⁵¹ *Blane v. Proudfit*, 3 Call. (Va.) 207, 2 Am. Dec. 546; *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168; *Beals v. Allen*, 18 Johns. (N. Y.) 363, 9 Am. Dec. 221; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Baring v. Pierce*, 5 Watts & Serg. (Penn.) 548, 40 Am. Dec. 534; *Brown v. Johnson*, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; *Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Carmichael v. Buck*, 10 Rich. (S. C.) L. 332, 70 Am. Dec. 226; *Savings Fund Society v. Savings Bank*, 36 Penn. St. 498, 78 Am. Dec. 390; *Thomas v. Atkinson*, 38 Ind. 256; *Blackwell v. Ketcham*, 53 Ind. 186; *Baxter v. Lamont*, 60 Ill. 237; *Adams v. Bourne*, 9 Gray (Mass.) 100; *Silliman v. Fredericksburg, &c.*, R. R. Co., 27 Gratt. (Va.) 119; *Wooding v. Bradley*, 76 Va. 614; *Strawn v. O'Hara*, 86 Ill. 53; *Campbell v. Sherman*, 49 Mich. 534; *Saginaw, &c., R. R. Co. v. Chappell*, 56 Mich. 190; *Cleveland v. Pearl*, 63 Vt. 127, 21 Atl. 261, 25 Am. St. 748; *Yates v. Yates*, 24 Fla. 64, 3 So. 821; *Montgomery Furniture Co. v. Hardaway*, 104 Ala. 100, 16 So. 29; *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480, 32 S. E. 591; *Sioux City, &c., Co. v. Magnes*, 5 Colo. App. 172, 38 Pac. 330; *History Co. v. Flint* (Tex. Civ. App.), 15 S. W. 912; *Cox v. Albany Brewing Co.*, 56 Hun (N. Y.) 489; *Americus Oil Co. v. Gurr*, 114 Ga. 624, 40 S. E. 780; *Brown v. West*, 69 Vt. 440, 38 Atl. 87.

⁵² *Sioux City, &c., Co. v. Magnes*, 5 Colo. App. 172, 38 Pac. 330; *Cleveland v. Pearl*, 63 Vt. 127, 21 Atl. 261, 25 Am. St. Rep. 748; *Montgomery Furniture Co. v. Hardaway*, 104 Ala. 100, 16 So. 29.

⁵³ *Michael v. Eley*, 61 Hun (N. Y.) 180.

⁵⁴ *Baldwin Fertilizer Co. v. Thompson*, 106 Ga. 480, 32 S. E. 591.

⁵⁵ *Yates v. Yates*, 24 Fla. 64, 3 So. 821; *Americus Oil Co. v. Gurr*, 114 Ga. 624, 40 S. E. 780.

⁵⁶ *Michael v. Eley, supra*.

⁵⁷ *Young v. Harbor Point Club Ass'n.*, 99 Ill. App. 290.

his representations or by assuming to exercise it; that an authority cannot be established by mere rumor or general reputation; that even a general authority is not an unlimited one, and that every authority must find its ultimate source in some act of the principal. An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing it should be in itself a sign of danger and suggest the duty to "stop, look and listen." It is therefore a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it.⁵⁸

§ 30. THIRD PERSONS MUST ACT IN GOOD FAITH.—It is evident that the rules which have been discussed are established for the protection of third persons who act in good faith. Collusion with the agent to take advantage of the apparent at the expense of the real authority, the willful shutting of eyes to restrictions which would otherwise be obvious, or any other practice or device to pervert the rules of law to a purpose not contemplated by them, should be fatal to a recovery. This is especially true where the party seeking to recover claims the benefit of an apparent authority, a holding out, or any conduct alleged to work an estoppel: only those who have relied in good faith are entitled to protection.⁵⁹

§ 31. PERSONS DEALING WITH AGENT MUST EXERCISE REASONABLE PRUDENCE.—The person dealing with the agent must also act

⁵⁸ "Whoever deals with an agent is put on his guard by that very fact, and does so at his risk. It is his right and duty to inquire into and ascertain the nature and extent of the powers of the agent, and to determine whether the act or contract about to be consummated comes within the province of the agency and will or not bind the principal." *BERMUDEZ*, C.J., in *Chaffee v. Stubbs*, 37 La. Ann. 656. It is the duty of third persons at their peril to ascertain what kind of an agent one is who represents himself as such and the extent of his powers: *Tompkins Mach. & Imp. Co. v. Peter*, 84 Tex. 627, 19 S. W. 860.

To same effect: *Gore v. Canada L. Ins. Co.*, 119 Mich. 136, 77 N. W. 650; *Rice v. Peninsular Club*, 52 Mich. 87; *Bush v. Wilcox*, 82 Mich. 336, 47 N. W. 328, 21 Am. St. 563; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726; *Snow v. Warner*, 10 Metc. (Mass.) 132, 43 Am. Dec. 417; *Dickinson County v. Mississippi Valley Ins. Co.*, 41 Iowa, 286; *Roberts v. Rumley*, 58 Iowa 301, 12 N. W. 323; *Beringer v. Meanor*, 85 Penn. St. 223; *Weise's appeal*, 72 Penn. St. 351; *Dozier v. Freeman*, 47 Miss. 647; *Davidson v. Porter*, 57 Ill. 300; *Reitz v. Martin*, 12 Ind. 306, 74 Am. Dec. 215; *Bleeker v. Satsop R. Co.*, 3 Wash. 77, 27 Pac. 1073; *Rosendorf v. Poling*, 48 W. Va. 621, 37 S. E. 555; *Lester v. Snyder*, 12 Colo. App. 351, 55 Pac. 613; *LaFayette Ry. Co. v. Tucker*, 124 Ala. 514, 27 So. 447.

⁵⁹ *Schneider v. Lebanon Creamery Co.*, 73 Ill. App. 612; *Rail v. City Nat. Bank*, 3 Tex. Civ. App. 557, 22 S. W. 865; *Jacoby v. Payson*, 85 Hun (N. Y.) 367; *Peabody v. Hoard*, 46 Ill. 242; *Proctor v. Bennis*, 36 Ch. Div. 740.

with ordinary prudence and reasonable diligence. Obviously, if he knows or has good reason to believe that the agent is exceeding his authority, he can not claim protection.⁶⁰ So if the suggestions of probable limitations be of such a clear and reasonable quality, or if the character assumed by the agent is of such a suspicious or unreasonable nature, or if the authority which he seeks to exercise is of such an unusual or improbable character, as would suffice to put an ordinarily prudent man upon his guard, the party dealing with him may not shut his eyes to the real state of the case, but should either refuse to deal with the agent at all, or should ascertain from the principal the true condition of affairs.⁶¹

This is particularly true where the agent is a stranger or one with whom the party has not dealt as agent. Care should be taken in such a case not to rely upon appearances which may be as consistent with other conditions as with the relation of principal and agent. Thus the mere fact that a stranger has in his possession and offers for sale the property of another as his agent, is as consistent with the fact that the pretended agent is a mere bailee or perhaps a thief, as that he actually has the authority which he assumes to possess.

§ 32 —— *Notice of Limitations.*—No particular method of giving notice of limitations upon the agent's authority can be insisted upon. Express and actual notice will, of course, suffice, but where the principal relies upon something less than that it must be of such a nature that failure to observe it is not consistent with the good faith and reasonable prudence which the law requires. It is frequently attempted to give notice by terms inserted in or warnings printed upon the contracts, orders, bill-heads or other papers made

⁶⁰ "No principle is better settled in law, nor is there any founded on more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and it is immaterial whether the agent is a general or a special one, because a principal may limit the authority of the one as well as that of the other." *Quinlan v. Providence, &c., Ins. Co.*, 133 N. Y. 356; 51 N. E. 31, 28 Am. St. 645; *Brown v. West*, 69 Vt. 440, 38 Atl. 87; *Wood Mow. & Reap. Mach. Co. v. Crow*, 70 Iowa 340, 30 N. W. 609; *In re Kern's Estate*, 176 Pa. 373, 35 Atl. 231; *Lewis v. Lewis*, 203 Pa. 197 — Atl. —; *Littleton v. Loan Ass'n.*, 97 Ga. 172, 25 S. E. 826; *Carter v. Aetna Loan Ass'n.*, 61 Mo. App. 218.

⁶¹ "The law is well settled," says *CHAMPLIN*, J., in *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726, "that a person who deals with an agent is bound to inquire into his authority, and ignorance of the agent's authority is no excuse. * * * The principal may be careless in reposing confidence in his agent, yet this does not make him liable to a third party, who, in dealing with such agent fails to exercise the diligence usual with good business men under the circumstances. If there is anything likely to put a reasonable business man upon his guard as to the authority of the agent, it is the duty of the third party to inquire how far the agent's acts are in pursuance of the principal's limitation." See also *National Bank v. Munger*, 95 Fed. 87, 36 C. C. A. 659 (approving text); *The Thos. Gibson Co. v. Carlisle*, 1 Ohio N. P. 398 (approving text); *Baldwin v. Tucker*, 112 Ky. 282, 65 S. W. 841; *Savage v. Pelton*, 1 Colo. App. 148, 27 Pac. 948.

or used by the parties. Such a notice is efficacious if actually observed or if so plain and obvious that the other party, as a reasonable man, cannot be heard to say that he did not observe it.⁶²

§ 33. ————— *Notice of Adverse Interests.*—It is fundamental that an agent, without the full knowledge and consent of his principal⁶³ will not be permitted to act as agent in transactions in which he is personally interested. It is often said that his endeavor to do so operates as an immediate revocation of his authority.⁶⁴ That an agent undertakes to do so is therefore enough to put the other party on his guard. This is clearly so where they are negotiating directly, and even where the other party claims rights traced through an agent's acts he must take warning when the chain of title shows that the agent has been exercising his powers in his own behalf.⁶⁵

§ 34. ————— *Effect of Principal's Negligence.*—It has been said in one or two cases that "the scope of an agency is to be determined not alone from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction."⁶⁶ On the other hand, where the trial court had charged the jury that if the principal knew the agent was violating his instructions "or could have known it by the exercise of ordinary diligence, he is estopped to deny the authority," the Supreme Court of Alabama said, "Though mere negligence, mere want of ordinary diligence, may furnish the agent an opportunity of undue assumption of authority, it does not of itself work an estoppel. A principal is not required to distrust his agent, nor to keep a vigilant watch over the manner in which he exercises his authority, and to see that his instructions are

⁶² *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655; *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740; *Gorham v. Felker*, 102 Ga. 260, 28 S. E. 1002; *Reeves v. Corrigan*, 3 N. Dak. 415, 57 N. W. 80; *Wood Mow. & Reap. Mach. Co. v. Crow*, 70 Iowa 340, 30 N. W. 609. Not when obscurely printed or otherwise not reasonably noticeable: *Kinsman v. Kershaw*, 119 Mass. 140; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *Trainor v. Morrison*, 78 Me. 160, 57 Am. Rep. 790; *Luckie v. Johnson*, 89 Ga. 321, 15 S. E. 459.

⁶³ "If such a power is intended to be given it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." *Per PECKHAM, J.*, in *Bank of N. Y. v. Am. Dock & Trust Co.*, 143 N. Y. 559, 38 N. E. 713.

⁶⁴ "As long as the agent is conducting negotiations for his principal with third parties, he may act on his behalf: but the moment he undertakes, without the knowledge of his principal, to conduct them with himself, his agency ceases and the powers and liabilities of that relation no longer exist." *Pine Mt. Iron & Coal Co. v. Bailey*, 94 Fed. 258.

⁶⁵ *Corn Exchange Bank v. Amer. Dock & Trust Co.*, 163 N. Y. 332, 57 N. E. 477; *Bank of N. Y. v. Am. Dock & Trust Co.*, 143 N. Y. 559, 38 N. E. 713; *Hanover Nat. Bank v. Am. Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72, 51 Am. St. 721; *Godfrey v. Schueck*, 105 Wis. 568, 8 N. W. 656.

⁶⁶ *Kingsley v. Fitts*, 51 Vt. 414; quoted with approval in *Little Pittsburgh Mine Co v. Little Chief Min. Co.*, 11 Colo. 225, 17 Pac. 760, 7 Am. St. 226.

obeyed. He may act on the presumption that third parties, dealing with his agent, will not be negligent in ascertaining the extent of his authority, as well as the existence of his agency. And negligence, to constitute a ground of liability, must have caused the plaintiff to repose trust on the authority of the agent, and the negligence of plaintiff must not have proximately contributed to the loss. The charge exacts of the principal a degree of diligence not required by the law.⁶⁷

The truth of the matter undoubtedly lies in the combination of these rules. The principal is not obliged to suspect his agent or to set another agent to watch him. He has a right to rely upon the other party's diligence to protect his own interests. He is not charged with knowledge of every departure by the agent from his authority. But it must be held that he is aware of the general method in which his business is being conducted, and if he leads reasonably prudent men to believe that such method meets with his approval, he cannot complain if they are held entitled to rely upon it.⁶⁸

§ 35. MUST ASCERTAIN WHETHER NECESSARY CONDITIONS EXIST.—So where the nature of the authority is such that it must have been conferred by written instrument, or must be a matter of public record, the party dealing with the agent must, at his peril, take notice of this fact, and ascertain whether the instrument or record is sufficient for the purpose.

For similar reasons, if the authority is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event or the happening of the contingency or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority.⁶⁹

§ 36. ———Facts Peculiarly Within Agent's Knowledge.—An exception to this general rule has been established in New York after

⁶⁷ Wheeler *v.* McGuire, 86 Ala. 398, 5 So. 190, 2 L. R. A. 808. The court quotes the rule laid down by Mr. WHARTON in his work on Agency, § 123: "When a principal conducts his affairs so negligently as to lead third persons to reasonably suppose that his agent has full powers, then if the agent exceeds his authority the principal must bear the loss. It is true that the principal is not chargeable with *culpa levissima*. He is not chargeable, in other words, with the consequences of those negligences into which good business men are liable to fall. But, if he is negligent to an extent beyond what is usual with good business men in his department, and if in consequence of his negligence, third parties repose trust on the supposed agent, then the loss, if loss accrue, must fall on the principal."

⁶⁸ See St. Louis Packet Co. *v.* Parker, 59 Ill. 23; Golding *v.* Merchant, 43 Ala. 705; Martin *v.* Webb, 110 U. S. 7, 15; Hanover Nat. Bank *v.* American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. 721.

⁶⁹ Craycraft *v.* Selvage, 10 Bush (Ky.) 696; Weise's Appeal, 72 Pa. 351; Kirkpatrick *v.* Winans, 16 N. J. Eq. 407.

"an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor." Stated in the language of one of the leading cases⁷⁰ it is that "where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." The typical cases have been those wherein the freight agent of a railroad company, authorized to issue bills of lading for goods received for carriage, has issued one when no goods were in fact received,⁷¹ or where the transfer agent of a corporation authorized to issue new certificates upon the surrender of old ones has issued certificates when no old one was in fact surrendered,⁷² and the bill of lading or new certificate has come into the hands of a bona fide holder who relied upon its recitals. Warehouse receipts for goods not deposited raise the same question, and much the same situation is presented where the cashier of a bank authorized to certify as good a check drawn upon funds certifies to one when no funds are present, though some courts distinguish upon the true negotiable character of the check which the bill of lading, warehouse receipt or certificate of stock does not possess.

§ 37. ————— The views of the New York courts have been approved in several of the other states in the bill of lading cases,⁷³ but are opposed by the English and Canadian courts,⁷⁴ the Supreme Court of the United States,⁷⁵ and a number of the state courts,⁷⁶ and

⁷⁰ *Bank of Batavia v. New York, &c., R. Co.*, 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440.

⁷¹ *Bank of Batavia v. New York, &c., R. Co.*, *supra*; *Armour v. Michigan Central R. Co.* 65 N. Y. 11, 22 Am. Rep. 603.

⁷² *New York, &c., R. Co. v. Schuyler*, 34 N. Y. 30.

⁷³ *Brooke v. New York, &c., R. Co.*, 108 Pa. 529, 1 Atl. 206; *Sioux City R. Co. v. First Nat. Bank*, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; *Wichita Savings Bank v. Atchison, &c., R. Co.*, 20 Kan. 519; *Fletcher v. Elevator Co.*, 12 S. Dak. 643, 82 N. W. 184 (a warehouse receipt case). See also *St. Louis, &c., R. Co. v. Larned*, 103 Ill. 293; *Sears v. Wingate*, 3 Allen (Mass.) 103. By statute: *Lazard v. Merchants' Transp. Co.*, 78 Md. 1, 26 Atl. 897.

⁷⁴ *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Ex. 330; *McLean v. Fleming*, L. R. 2 H. L. Sc. 128; *Brown v. Powell*, L. R. 10 C. P. 562; *Cox v. Bruce*, 18 Q. B. Div. 147. In Canada: *Erb v. Gt. West. Ry. Co.*, 42 U. C. Q. B. 90, 30 Ont. App. 446, 5 Can. S. C. 179.

⁷⁵ *Friedlander v. Railway Co.*, 130 U. S. 416; *St Louis, &c., Railway Co. v. Knight*, 122 U. S. 79; *Pollard v. Vinton*, 105 U. S. 7; *The Freeman v. Buckingham*, 18 How. (U. S.) 182; *American, &c., Co. v. Maddock*, 93 Fed. 980, 36 C. C. A. 42.

⁷⁶ *National Bank of Commerce v. Chicago, &c., R. Co.*, 44 Minn. 224, 46 N. W. 342, 20 Am. St. 566, 9 L. R. A. 263; *Black v. Wilmington R. Co.*, 92 N. Car. 42, 53 Am. Rep. 450; *Baltimore, &c., R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26 (immediately changed by statute); *Louisiana Nat. Bank*, 52 Mo. 380 (see *Smith v. Missouri, &c., R. Co.*, 74 Mo. App. 48); *Hunt v. Railroad Co.*, 26 La. Ann. 446; *Dean v. King*, 22 Ohio St. 118.

these courts undoubtedly represent the weight of authority. Nevertheless the New York rule is believed to be sound. Although not strictly negotiable, the bill of lading has a well known commercial character which can not be ignored. The companies which issue them are not ignorant of it. The agent is put there to receive goods and issue bills of lading. His act of issuing one is a representation of a fact peculiarly within his own knowledge and which he is put there to determine. It is an act apparently within his actual authority. There is nothing to apprise a person relying upon it of the real state of the case. Suppose he undertakes to investigate: of whom shall he inquire whether the goods have actually been received? He would naturally go to the very agent who has already made a written certificate that the goods have been received. Why ask for further assurances? If he goes to the railroad company, at its principal office, and inquires, the course of business would be for a superior agent to inquire of the very agent who issued the bill of lading. Why inquire of him again when his assurance is already in hand?

Suppose an agent is placed in charge of a store with authority to buy, upon his principal's credit, such goods as are needed to keep up the stock. He buys all needed goods of A, and then buys more of B telling him that the goods are needed and B relies in good faith upon his statement. May B not recover of the principal, even though the goods were not needed and never came to his use? Suppose an agent is authorized to issue notes in his principal's name for use in his business. He issues one in his principal's name, saying to the person who receives it, and who acts in good faith, that it is for use in the principal's business. Is not the principal liable although the note was really put to an unauthorized use?

The rule of the New York courts does not apply where it appears that the agent was acting in his own behalf.

§ 38. SAME SUBJECT.—*Authority of Public Agents Must Be Ascertained.*—And this rule imposing upon third persons the duty to ascertain the conditions upon which the agent's authority may be exercised, is particularly true in the case of public agents. Here the authority is a matter of public record or of public law of which every person interested is bound to take notice, and there is no hardship in confining the scope of such an agent's authority within the limits of the express grant and necessary implication.⁷⁷ The fact

⁷⁷ *Mayor of Baltimore v. Eschbach*, 18 Md. 276, 282; *Mayor of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *State v. Bank*, 45 Mo. 528; *Lee v. Munroe*, 7 Cranch (U. S.) 366; *Curtis v. United States*, 2 Nott. & Hunt (U. S. Ct. Cl.) 144; *Pierce v. United States*, 1 *Id.* 270; *State v. Hastings*, 10 Wis. 518; *Hull v. Marshall County*, 12 Iowa, 270; *Silliman v. Fredericksburg, &c.*, R. R. Co. 27 *Gratt.* (Va.) 119; *The Floyd Acceptances*, 7 *Wall.* (U. S.) 680; *Clark v. Des Moines*, 19 Iowa 199, 87 Am. Dec. 423; *State v. Hays*, 52 Mo. 578; *Delafield v. State*, 26 Wend. (N. Y.) 192; *People v. Bank*, 24 Wend. (N. Y.) 431; *Whiteside v. United States*, 93 U. S. 247.

that the same act might have been within the scope of the authority if created by a private individual is not conclusive.⁷⁸

Thus in a case involving the validity of a contract made by the city commissioner of Baltimore, the court said: "Although a private agent acting in violation of specific instructions yet within the scope of a general authority, may bind the principal, the rule as to the effect of a like act of a public agent is otherwise. The city commissioner was the public agent of a municipal corporation, clothed with duties and powers specially defined and limited by ordinances bearing the character and force of public laws, ignorance of which can be presumed in favor of no one dealing with him on matters thus conditionally within his official discretion. For this reason the law makes a distinction between the effect of the acts of an officer of a corporation and those of an agent of a principal in common cases. In the latter the extent of the authority is known only to the principal and agent, while in the former, it is a matter of record in the books of the corporation or of public law."⁷⁹

⁷⁹ Mayor of Baltimore *v.* Eschbach, *supra*.

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⁷⁸ Mayor *v.* Eschbach, *supra*; Mayor *v.* Reynolds, *supra*.

"By the law of agency at the common law, there is this difference between individuals and the government; the former are liable to the extent of the power they have apparently given to their agents, while the government is liable only to the extent of power it has actually given to its officers." LORING, J., in *Pierce v. United States*, *supra*.